

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000640-001 DT

11/25/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

JOHN STAPERT

MICHAEL D WOLVER

v.

ARIZONA BOARD OF PSYCHOLOGICAL
EXAMINERS (001)

NANCY J BECK

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This case arises out of an appeal of a disciplinary decision of the Arizona Board of Psychologists Examiners ("Board") to sanction Plaintiff for violation of A.R.S. § 38-502(11).¹ The Board filed a motion to dismiss pursuant to Ariz. R. Civ. P. 12(b) in which it contends that Plaintiff failed to timely file a motion for rehearing and that failure deprives this Court of jurisdiction of hear the appeal. This motion has been under advisement and the Court has considered and reviewed the argument and the memoranda submitted by counsel.

1. Factual and procedural background

The Board is the state agency that licenses and regulates psychologists in Arizona.² Plaintiff, John Stapert, Ph.D., is a licensed psychologist in Arizona. On March 24, 2003, after Informal Interview following a complaint filed with the Board, the Board issued its decision in which it found Plaintiff to be in violation of Arizona law and issued an order of Probation imposing certain requirements on Plaintiff to satisfy probation.³ The Decision was mailed to Dr. Stapert on March 24, 2003. On April 25, 2002, Dr. Stapert delivered his Motion for Reconsideration of the Board's Decision via messenger. However, the messenger delivered the Motion to the Office

¹ Complaint, ¶ 9.

² A.R.S. § 32-2061 et seq.

³ Complaint, ¶ 10.

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of Administrative Hearings and not to the Board as instructed by counsel for Plaintiff.⁴ The deadline for filing a request for rehearing at the Board's office was April 28, 2003.⁵ Thereafter, the Board advised Plaintiff that a motion for rehearing not having been filed, the Board's decision was final on April 28, 2003.⁶ Upon learning that the Motion had not been delivered to the Board, Plaintiff's counsel sent the motion to the Board on May 9, 2003 via fax. On June 6, 2003 the Board declined to consider the Motion for Reconsideration because the Board concluded it was untimely.⁷ Thereafter, Dr. Stapert filed this action as a complaint for Review of Administrative Decision or in the Alternative, Special Action Relief. ("Complaint"). Defendant, the Board, filed this Motion to Dismiss.

The Board filed this motion to dismiss pursuant to Ariz. R. Civ. P. 12(b), contending that this court is without jurisdiction to hear Plaintiff's appeal because Plaintiff failed to timely file a motion for rehearing and that failure deprives this court of jurisdiction to hear the appeal. In addition, Defendant contends that pursuant to Rule 12(b)(6), Plaintiff failed to state a claim upon which relief can be granted. Finally, Defendant contends that Special Action Relief is not appropriate. Plaintiff contends that he timely submitted a request for rehearing that was delivered to the wrong state agency through no fault of Plaintiff and that the Board erred in refusing to consider his motion for rehearing.

2. Standard of Review

To prevail on its Motion to Dismiss, Defendant is required to show that under no set of facts or inferences from those facts, could Plaintiff prove its claims.⁸ Motions to dismiss for failure to state a claim are not favored and should not be granted unless it appears certain that plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated.⁹ In considering a motion to dismiss, this Court accepts the allegations in the complaint as true and resolves all inferences in favor of plaintiff.¹⁰

3. Discussion

The narrow issue presented to this court in this motion is whether the Board properly refused to accept Dr. Stapert's Motion for Reconsideration as timely under the circumstances of this case. The Board contends first that a motion for rehearing was not timely filed, and second that

⁴ Complaint, ¶¶ 13, 15.

⁵ Complaint, ¶ 12.

⁶ Complaint, ¶ 14.

⁷ Complaint, ¶ 18.

⁸ *Luchanski v. Congrove*, 193 Ariz. 176, 180, 971 P.2d 636, 640 (App. 1999)

⁹ *State ex rel. Corbein v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1310 (1983)

¹⁰ *Southwestern Paint & Varnish Co. v. Arizona Dept. of Environmental Quality*, 194 Ariz. 22, 976 P.2d 872.

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the Board's decision to refuse to consider Plaintiff's motion as timely is not an appealable decision.

Plaintiff was required to file a motion for rehearing within 30 days of the Board's decision before he could seek judicial review of the decision.¹¹ If parties fail to follow statutory procedures established for administrative remedies available to them, the "superior court lacks jurisdiction to consider their claim."¹² Plaintiff failed to timely file a motion for rehearing with the Board. Plaintiff's failure deprives this Court of jurisdiction to review the Board's decision.¹³ If this court accepts that the motion for reconsideration was not timely filed, Plaintiff's complaint for administrative review was not timely and must be dismissed for lack of jurisdiction.

Plaintiff does not really dispute Defendant's argument.¹⁴ Instead, Plaintiff contends that under the circumstances of his case, his motion for reconsideration was timely and that the Board was unjust in its refusal to accept his motion as timely.¹⁵

On this motion, the Court must accept the allegations of the complaint as true. Accordingly, Plaintiff timely prepared and submitted a Motion for Reconsideration for hand delivery to the Board and gave the motion to a recognized delivery service with proper instructions to have it delivered to the Board.¹⁶ By mistake, the delivery service delivered the Motion for Reconsideration to another state agency and not to the Board.¹⁷ The mistaken delivery was unknown to Plaintiff and was outside of his control.¹⁸ However, the Plaintiff bears the ultimate responsibility for the correct filing of motions, such as the Motion for Reconsideration, and the responsibility to verify that its employees or agents have performed their duties correctly. When the Board notified Plaintiff that it had not received a Motion for Reconsideration, Plaintiff promptly provided a copy of the Motion to the Board via facsimile. On June 6, 2003, the Board heard oral argument on the question of the timeliness of Plaintiff's Motion for Reconsideration and voted not to accept it because it was not timely.¹⁹ The Complaint in this administrative

¹¹ A.R.S. 41-1092.09(C). A.R.S. § 41-1092.09(B). Because the Board mailed the notice of Decision to Plaintiff, and service was complete five days after mailing. The thirty-fifth day fell on a Sunday, Plaintiff's deadline to file a rehearing motion with the Board was Monday, April 28, 2003.

¹² *Moulton v. Napolitano*, 205 Ariz. 506, 73 P.3d 637, 642 (App. 2003) ("the doctrine of exhaustion of administrative remedies . . . is a procedural prerequisite to judicial review of an agency determination." When properly invoked, "the trial court may not exercise jurisdiction of the action." *Id.*, n.2.

¹³ Motion to Dismiss, August 13, 2003, ("Motion"), page 4-5

¹⁴ Complaint, ¶ 12.

¹⁵ Response to Defendant's Motion to Dismiss, September 2, 2003, ("Response"), page 6.

¹⁶ Complaint, ¶ 13.

¹⁷ Complaint, ¶ 15. The Motion for Reconsideration was delivered to the Office of Administrative Hearings, located in the same building but on a different floor than the Board.

¹⁸ Complaint, ¶ 17.

¹⁹ Complaint, ¶ 18. By letter Date June 10, 2003, the Board notified Plaintiff of its decision not to consider the Motion for Reconsideration on the grounds that it was untimely filed. Complaint, ¶ 19.

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review was filed within the time limit from the date of service of the Board's decision not to accept the Motion for Reconsideration.²⁰

Defendant contends that the Board's decision not to accept his Motion for Reconsideration is not a final decision that is appealable in a judicial review action.²¹ Only "final" decisions of administrative agencies are reviewable.²² The Board's action in refusing to accept Plaintiff's Motion for Reconsideration is not a final decision that is appealable in a judicial review action.²³ The only appealable order involved in Plaintiff's case is the Findings of Fact, Conclusions of Law, and Order of Probation issued March 24, 2003. With respect to that order, this Court lacks jurisdiction to review it because Plaintiff failed to file a timely Motion for Reconsideration. The Board decision that refused to consider the ill-fated Motion for Reconsideration is, according to the Board, not appealable.

Plaintiff relies on *Dioguardi v. Superior Court*²⁴ in support of his contention that the Board's refusal to accept his Motion for Reconsideration as timely is subject to judicial review.²⁵ In *Dioguardi*, the Court considered the validity of an administrative procedural rule relating to the time allowed for filing motions for rehearing. The rule itself was the subject of review. At issue was the question whether the agency's rehearing rule was invalid as contrary to the statutory law governing procedure before an agency. Here, the Board's action in refusing to accept Plaintiff's misdirected motion is not contrary to statutory law or administrative procedural rule. Plaintiff's contention is that the Board's refusal to accept his motion was unjust. However, he presents no argument or any authority that the Board's action was contrary to law. Accordingly, this Court concludes that the Board's refusal to consider Plaintiff's motion was not a final decision subject to judicial review.²⁶

Finally, Defendant contends that Special Action jurisdiction is not appropriate. The delivery of Plaintiff's Motion to the wrong state agency, without Plaintiff's knowledge and outside of his control, rendered him without any remedy. The Decision on the merits is not appealable because the Motion for Reconsideration was delivered to the wrong agency and the Board's decision to refuse to accept the Motion as timely under the circumstances is not an appealable order.

The decision whether to accept Special Action Jurisdiction is within the sound discretion of the court. The Plaintiff is not entitled to equitable relief where he caused the inequity of which he complains.²⁷ In addition, Plaintiff's contention that the Board's action was "arbitrary,

²⁰ A.R.S. § 12-904(A).

²¹ Motion, page 7.

²² A.R.S. § 12-902.

²³ See *Guminski v. Arizona State Veterinary medical Examining Board*, 201 Ariz. 180, 183, 33 P.2d 514, 517 (App. 2001). ("The term "decision" does not apply to the Board's rulings on requests for rehearing or review....")

²⁴ 184 Ariz. 414, 909 P2d 481 (App. 1985).

²⁵ Response, page 6.

²⁶ *Guminski v. Arizona State Veterinary medical Examining Board*, 201 Ariz. at 183, 33 P.2d at 517.

²⁷ *Rosenberg v. Arizona Bd. of Regents*, 118 Ariz. 489, 493, 578 P.2d 168, 172 (1978).

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capricious and unreasonable conduct” is not conclusive. “Where there is room for two opinions the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.”²⁸ Plaintiff offers no authority that the Court should find that the Board’s decision was necessarily unreasonable. The request for rehearing was required to be filed with the Board by April 28, 2003. When he sent his motion to the Board’s office on May 9, 2003, it was clearly late, albeit with a feasible justification. Nonetheless, the Board was not required to treat his motion as timely because of the circumstances and this Court cannot say that the Board’s action was unreasonable or was an abuse of discretion.

4. Conclusion.

Because Plaintiff did not file a Motion for Reconsideration within the time allowed, the Board’s decision on the merits was final as of April 28, 2003. This court is without jurisdiction to consider Plaintiff’s appeal because he failed to exhaust his administrative remedies. The Board’s decision not to accept Plaintiff’s untimely Motion is not an appealable decision. Finally, this Court declines to exercise Special Action jurisdiction. Accordingly, this Court concludes that Defendant’s Motion to Dismiss should be granted.

IT IS THEREFORE ORDERED granting the defendant’s Motion to Dismiss in this case.

IT IS FURTHER ORDERED that counsel for the defendant shall lodge an order consistent with this opinion no later than December 17, 2003.

²⁸ *Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 410-11, 4 P.3d 460, 465-66 (App. 2000).